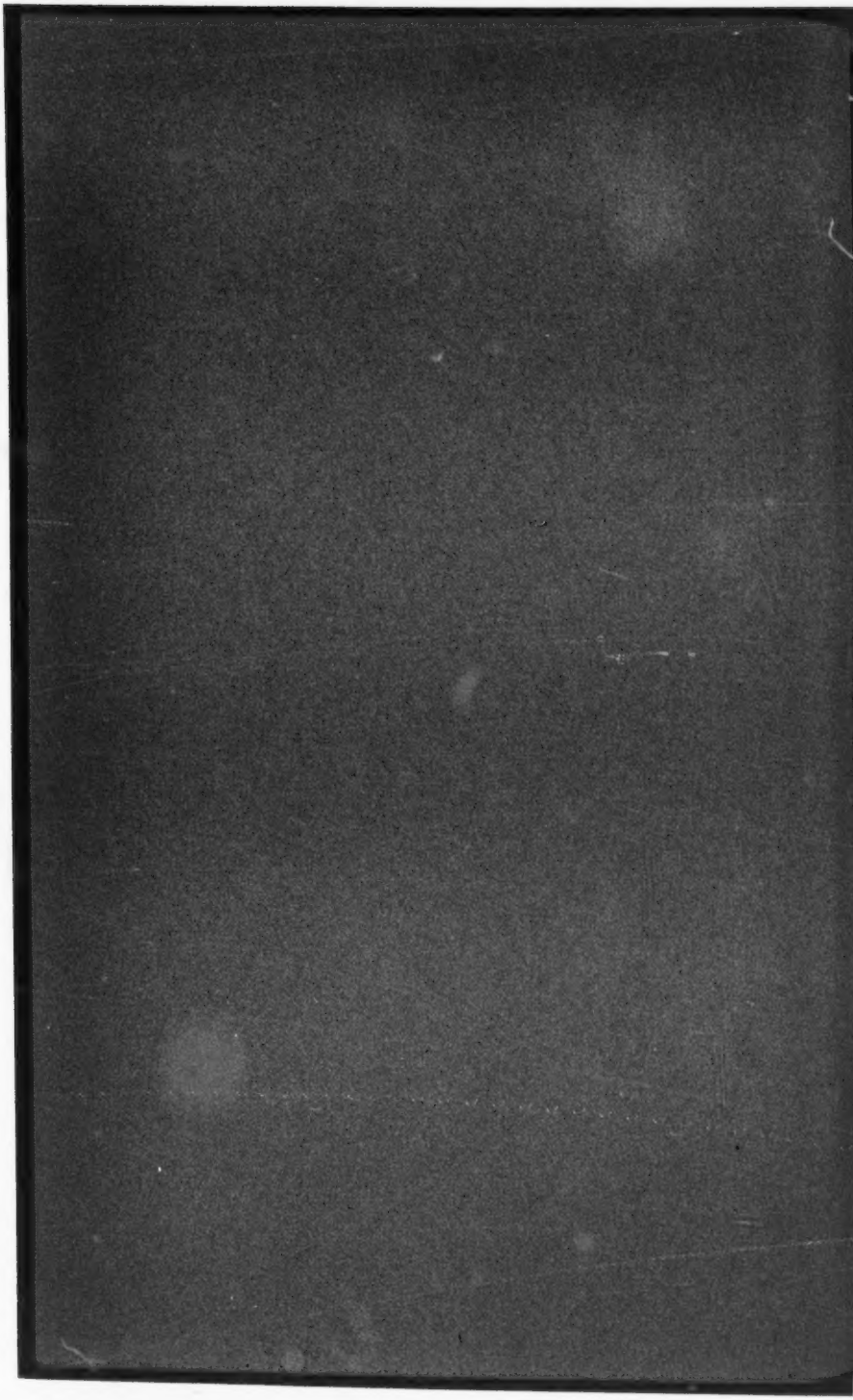

APPENDIX "A."

Evidence of Surrounding Circumstances Supports Circuit Court's Decision That the Parties Intended to Restrict the Use of the Land to Channel Purposes Only.

The following summary is in answer to the claim advanced by petitioner (p. 17) that resort to the circumstances surrounding the execution of the deeds would have disclosed "the complete absence of any basis for concluding that the parties intended to reserve to the grantor the mineral rights in the lands conveyed, or to preclude the United States from enjoyment of such minerals as might be found to exist."

It is true, as petitioner says (p. 17), that the Railroad was the moving party, but it is not reasonable to assume that it desired to give to the Government any greater right or interest in its land than was necessary for the enlarged channel which it sought. Likewise, it is not reasonable to assume that the Secretary of War, in the exercise of his statutory duty of protecting navigation, was endeavoring to secure lands merely as lands, or to obtain any greater right than was necessary for the creation of the new and enlarged waterway. (That the Secretary acted merely under his statutory authority to control and protect navigation is shown by the reference to Section 10 of the Act of March 3, 1899, in the first clause of the permit itself. (R. 162.)) A deed conveying the right to use the land for channel purposes only was entirely sufficient for the purpose both parties had in view and hence the natural presumption is that no greater rights were conveyed. Whether this right amounted to an easement or a limited fee was, as the Circuit Court held, immaterial;

the result was the same. However, the presumption under California law, as well as the facts herein set forth, goes much farther than the Circuit Court found necessary to go, and strongly indicates that what was really intended was only an easement.

Under California Law there is a strong presumption that a grant for purposes of a public "way," whether by land or water, conveys only an easement.* Easements are generally created by dedication, either by grant or by acts *in pais*. That the Railroad Company intended a dedication is evidenced by the original application of that company (and Pacific Dock and Terminal Company, which joined with it). This application dated April 18, 1908 [R. 157], contained the following statements:

> "Your petitioners further represent and show that *they will dedicate*, and *hereby offer to dedicate*, not only *the lands required in the construction of said channels* but, in order to provide for the future improvement of said channels as commercial needs may necessitate, also the following described strips or parcels of land *for use as free, public, navigable waterways.*
>
> "(a) A strip approximately some 7000 feet in length by 400 feet in width . . .
>
> * * * * * * * *
>
> *"Such offers of dedication to be followed by the execution of any further instruments that may be deemed necessary to assure the same, . . ."*

**Wood v. Truckee Turnpike Co.*, 24 Cal. 474, 487; *Wright v. Austin* (1904) 143 Cal. 236, 239, and numerous cases cited therein; *Gurnsey v. Northern Calif. Power Co.* (1911) 160 Cal. 699; *City of Burlingame v. Norbert* (1930) 210 Cal. 105; 4 *Tiffany, Real Property* (3d ed.) § 1112; 18 Corpus Juris, pp. 108-109.

This offer of dedication was transmitted by the United States Engineer to the Chief of Engineers, with a letter of recommendation which contained the following statements [R. 167]:

"2. *It is proposed by the Companies to dedicate to the United States a strip of land 400 feet wide* . . .

* * * * * * * *

"5. As a whole the improvement proposed is an exceptionally good one, substituting as it does for the navigable channel of Cerritos Slough between Long Beach and Wilmington Lagoon a straight strip 400 feet wide, which is to be dredged at once to a depth and width that will make it better suited to the purposes of navigation as carried on at present than is Cerritos Slough itself. Furthermore, it will enable private parties or the Government in the future to make an excellent ship channel without the necessity for buying by special agreement, or through condemnation, land which would be necessary were Cerritos Slough to be improved by widening and straightening without the *dedication* of the 400-foot strip *as proposed* by the San Pedro, Los Angeles & Salt Lake Railroad Co.

* * * * * * * *

"13. I have the honor, therefore, to recommend that the Los Angeles Dock & Terminal Co. and San Pedro, Los Angeles & Salt Lake Railroad Co. be authorized to straighten and widen Cerritos Slough by at once dredging a channel 5 feet deep and at least 40 feet in width, . . . *provided they dedicate a strip 400 feet wide for a ship channel* . . ."

The Chief of Engineers transmitted the application to the Secretary of War, together with his recommendation which contained the following [R. 175]:

> "4. It is therefore recommended that permits *as requested* be granted, as follows:
>
> "(A) To the applicants jointly for the improvement of Cerritos Slough by the excavation of a straight channel as shown on the accompanying map subject to the conditions—
>
> "(a) That a strip of land 200 feet wide on each side of the center line and throughout the length of the proposed channel shall be deeded to the United States free of cost before the work of excavation is begun."

The Secretary of War then issued his permit, which read, in part, as follows [R. 163-4]:

> "NOW, THEREFORE, This is to certify that, *in accordance with the recommendation of the Chief of Engineers,* the Secretary of War hereby gives permission unto the said Los Angeles Dock and Terminal Company and the San Pedro, Los Angeles & Salt Lake Railroad Company, jointly to execute a project for the improvement of Cerritos Slough by the excavation of a straight channel at said place, as shown on said map, subject to the following conditions:
>
> "1.—That a strip of land 200 feet wide on each side of the center line and throughout the length of the proposed channel shall be deeded to the United States, *free of cost,* before the work of excavation is begun. 2.—That the dredged channel shall be at least five (5) feet deep and forty (40) feet wide throughout its length. 3.—That the said channel ***shall be free from tolls.***"

It will be seen that the permit was issued "in accordance with the recommendation of the Chief of Engineers" who, in turn, had recommended that the permit be granted "as requested," thus clearly indicating that the original offer of dedication was accepted.

It is true that the permit contained a condition that a strip of land 200 feet wide "should be deeded to the United States free of cost" but there is nothing in this to show that the deed was to convey anything more than was offered and recommended, to-wit, an easement.

The record shows that the recommendation of the Chief of Engineers and also the permit of the Secretary of War were submitted to and approved by the Judge Advocate General. [R. 162, 174.] Furthermore, the deed was submitted to the United States Attorney, who took an active part in closing the transaction. [R. 285.] If the Secretary of War had intended to reject the offer of dedication and require the conveyance of title in fee simple without restrictions, skilled attorneys for the Government would certainly have included in the permit an express requirement to that effect and would not have accepted deeds expressly limiting the purpose of the grant to the use of a free, public, navigable channel only. The fact is that respondent never has received any notice or intimation prior to the commencement of this action that petitioner needed or desired any greater interest in the premises than an easement for channel purposes. Obviously, for the purposes of a channel petitioner never has needed any greater interest than an easement.

That the deed called for by the permit was intended to convey the proffered easement is further borne out by the provision of the permit "that said channel shall be free

from tolls." If the Secretary of War had intended that the land be conveyed in fee simple, this condition would have been meaningless. The Railroad Company in such case would have had no power to charge tolls on land owned in fee by the United States. This requirement of the permit was given effect in the 1908 and 1918 deeds by the words of the *habendum* clause, which state that the United States is to have and to hold the land for the purposes of a public channel "and subject *for such purposes* to the control, improvement and regulation of said grantee," thus vesting in the United States the power of control and regulation so far as tolls or other interferences with commerce might be involved, a right wholly unnecessary to convey if any estate greater than an easement or a fee limited to the use for channel purposes only had been granted.

Petitioner mentions, as one of the surrounding circumstances indicating a contrary intent from that found by the Circuit Court, that the resolution of the Railroad's board of directors "failed to refer to any reservation of minerals." (p. 18.) The fact is that the Railroad's board of directors were acting upon the understanding that the original offer of dedication had been accepted and that the deed which they were authorizing was being given to assure the dedication. This is clearly indicated by the recitals of the deed which are part of the resolution and which recite that the Railroad Company (jointly with Los Angeles Dock and Terminal Company) had filed an application to improve Cerritos Slough and which state specifically [R. 193]: "Whereas, the said application has been granted," showing unmistakably that the directors understood and believed that the permit was an approval and an acceptance of its original offer of dedication.

Furthermore, the resolution itself specifically sets forth the limitations and conditions which are to be included in the deed. [R. 194-5.] The precise language limiting the use to a "free, public, navigable channel or waterway only" and providing for reverter if the land should be used for "any purposes other than specified" is explicitly set forth in the resolution of the board of directors. In view of these facts, a mineral reservation was obviously superfluous and unnecessary, since no right to take the minerals would pass by such a grant, in any event.

Following the granting of the permit there was an exchange of correspondence extending over a considerable time between respondent and officers of the government in which it is continually stated that the deeds are for "channel purposes" and to convey a "right of way". Among these were:

Letter of transmittal of deed from respondent to Secretary of War, July 10, 1908 [R. 266]:

> "I have the honor to hand you herewith deed from San Pedro, Los Angeles & Salt Lake Railroad Company to the United States of America to a strip of land situated in the City of Long Beach, . . . *for use* by the Government for the construction, maintenance and use *of a free public navigable channel or waterway. This deed is made in pursuance of the requirements of the permit issued by yourself* to the said Railroad Company and to the Los Angeles Dock & Terminal Company, under date of June 11, 1908."

Letter of Captain Fries, U. S. Engineers, to respondent, July 24, 1908 [R. 268]:

> ". . . I return herewith deed from your company to the United States to strip of land in Long Beach *to be used for channel purposes,* . . .
>
> ". . . It is thought that . . . *all conditions should be eliminated* from the deed, but if you insist upon the lines 25-30, page 2, being contained in the deed, I would suggest that they be modified to something similar to the following:" [R. p. 269.]

The objection to the conditions was later withdrawn.

Letter of Captain Stokey, U. S. Engineers, to respondent, August 26, 1910 [R. 283]:

> "I return herewith the deed executed by you July 3, 1908, conveying to the United States *a portion of the right of way for Cerritos Channel,* intended as a substitute for old Cerritos Slough, *to be used for navigation purposes* by connecting Long Beach Harbor with Los Angeles Harbor; . . ." (For the making of certain minor corrections therein.)

Letter of respondent to Captain Stokey, U. S. Engineers, October 19, 1910 [R. 286]:

> ". . . As you probably know, this land is in fact a donation from our company to the Government. *It is not to be used for the erection of any public building, but merely for channel purposes.** and as an abstract would cost in the neighborhood of fifteen hundred to two thousand dollars, we felt that under the circumstances a certificate of title, which is universally accepted in this section of the country, would be as satisfactory as an abstract. . . .

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*Italics are in the original exhibit.

"I have examined the reference to the 25th Statute at Large made by the Attorney General in his letter, but it seems to me the section of the law hardly applies to the situation under consideration. The statute in question states:

" 'That hereafter in the procurement of sites for such *public buildings** it shall be the duty of the Attorney General to require of grantors in each case to furnish, free of all expense to the Government, all requisite abstracts, official certifications, and evidences of title that the Attorney General may deem necessary.'

"You will note that the law in question refers to the procurement of sites for *public buildings, and the deed to the lands in this case limits the use to channel purposes.** This would seem to remove the case from the scope of the section." [R. 286-287.]

Letter of Lieutenant Leeds, U. S. Engineers, to respondent, Feb. 16, 1911 [R. 289]:

"War Department
United States Engineer Office
723 Central Building
Los Angeles, Cal.

February 16, 1911.

"San Pedro, Los Angeles & Salt Lake Railroad Co.,
Pacific Electric Building,
Los Angeles, Calif.

Sirs:

"Referring to your letter of the 10th instant, returning *deeds conveying* to the United States *rights of way for Cerritos Channel* and a channel to be used as a substitute for Dominguez Creek, I have to inform you that I have forwarded the three deeds

to the County Recorder with request that the same be recorded and returned to me.

"In this connection it is noted that the certificate of title returned with the deeds shows clear title up to 8:00 A. M., May 13, 1910. It is requested therefore that you furnish me a statement that no action has been taken which would in any way affect the *title to these rights of way* from the date of the certificate referred to above up to the time the deeds are recorded—probably this date.

Very respectfully,

CHAS. T. LEEDS,
1st Lieut., Corps of Engineers."

Letter of respondent to Lieutenant Leeds, March 1, 1911 [R. 290]:

"Deeds—Cerritos Channel.
Mch. 1st, 1911.

"Hon. Charles T. Leeds,
1st Lieut. Corps of Engineers,
723 Central Bldg., Los Angeles, Cal.

Sir:—

"I have your favor of Feb. 16th, addressed to our Company, and replying to your request, I have to say that no action has been taken by our Company since the date of the certificate, which would in any way affect *title to the rights of way described* in said certificate and *in the deeds* heretofore referred to you.

"Trusting that this will satisfy your wishes, I am,

Yours very truly,

(Signed) A. S. HALSTED,
General Attorney."

The last two letters refer to the actual transmittal and acceptance of the deed. These letters describe the deed as conveying "right of way" for Cerritos Channel and constitute a construction at the very time of the acceptance of the deed that a right of way only was conveyed and also that the grant of a right of way was in full compliance with the permit of the Secretary of War.

Petitioner refers repeatedly (pp. 5, 6, 18, 19) to the quitclaim deeds from the mortgage trustee as containing no mineral reservations and no limitations of use. And, referring to one of them (p. 19, note), petitioner says: "It was this deed which actually conveyed the legal title * * *." That statement is literally true, but possibly misleading. Under the law of California, a trust deed given to secure a debt is, in substance and effect, merely a mortgage with power of sale. The beneficial ownership remains in the trustor and "Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title." (*Bank of Italy, etc. v. Bentley,* 217 Cal. 644, 656 (1933); *Ainsa v. Mercantile Trust Co.,* 174 Cal. 504, 510 (1917); *Hollywood Lumber Co. v. Love,* 155 Cal. 270, 273 (1909).)

It follows that the deeds executed by respondent were the effective conveyances, and the quitclaims executed by the trustee operated merely to release the property from the lien of the mortgage bonds. It would appear that counsel for petitioner was aware of this rule of California law. At the bar below, counsel for petitioner in answer to a question from Judge Denman stated unequivocally that petitioner is not claiming herein under the deeds of the trustee.

Coming to the 1918 deed, the petition states (p. 5) that this deed was made pursuant to an appropriation by Congress for improvements of the harbor, such appropriation being upon the condition that "local interests deed to the United States, free of cost, an additional strip of land two hundred feet wide." This statement is incomplete and hence misleading. The Act of Congress specifically provided that the appropriation was to be "subject to the conditions set forth" in House Document 460 [R. 215, *seq.*]. This document is a letter from the Secretary of War to the Speaker of the House of Representatives, transmitting reports of the United States Corps of Engineers describing the work which was to be the basis for the Congressional appropriation. The report states [R. 218]:

> "that local interests will contribute toward the work the sum of $242,300, and deed to the United States, free of cost, an additional strip of land 200 feet wide *alongside the present 400-foot right of way*. . . .
>
> ". . . In connection with its consideration of the subject, the board visited the locality and received assurance from local interests that *the additional strip of land 200 feet wide required for right of way* would be furnished . . ."

This House document constituted a representation by the United States that it owned only a right of way in the 400-foot strip and would require only a right of way for the additional 200 feet. The Act of Congress appropriating funds in 1918 was predicated upon this House document.

That act in part was as follows [R. 227]:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Con-*

*gress assembled,** That the following sums of money be, and are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available, and to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers for the construction, completion, repair and preservation of the public works hereinafter named:

* * * * * * * *

"Los Angeles Harbor, California: . . .

"Waterway connecting Long Beach and Los Angeles Harbors, California: Completing improvement *in accordance with the report submitted in House Document Numbered Four hundred and sixty*, Sixty-fourth Congress, first session, and *subject to the conditions set forth in said document*, $130,350."

This was the act of the United States itself. Relying upon these representations and this Act of Congress, respondent executed its second deed covering the additional 200 feet.

While this Act was pending in Congress, respondent addressed a letter to the United States Engineer regarding the terms of the 1918 deed, in which it stated [R. 213]:

> "We assume that a deed in the same form as that used in conveying the original 400 foot strip will be satisfactory. Please advise."

The United States Engineer replied [R. 311] approving this proposal, and stating that the transfer of the land was to be in accordance with House Document No. 460, which was the basis of the Congressional action. This exchange of letters, coupled with this House Document

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*Italics are in original exhibit.

and Act of Congress, demonstrates that the condition of the Congressional appropriation was the grant of an additional right of way. These documents further show that it was the intention of the parties that the 1918 deed should convey the same interest as the 1908 deed, to-wit, a right of way. In other words, the first deed explains and interprets the second deed, and not the second the first, as claimed by petitioner. This evidence further completely disposes of the claim (p. 19) that the phrase in the granting clause of the 1908 deed, "for the construction, maintenance and use of a free public navigable channel or waterway only" must be disregarded from both deeds because it was omitted from the granting clause of the second deed. Whatever may have been the cause of its omission from the second deed, the fact is clear that it was understood by both parties that the first deed conveyed only a right of way and that the additional 200 feet was required solely for right of way purposes.

Subsequently, in House Document 1013 [R. 317] the 600 foot channel is described as "the present 600-foot right of way." In Senate Document 130, dated April 21, 1930 [R. 334] it is stated:

> "The Federal Government *has an easement over a strip* 600 *feet wide*. Harbor lines have not yet been established but *the easement was granted* with the idea that pierhead lines would be established 600 feet apart. . . ."

On July 3, 1930, another Act of Congress was passed [R. 337] appropriating further funds for the improvement of this channel "in accordance with the plans recommended in the reports hereinafter designated." One of these reports is Senate Document 130 above mentioned. Again,

as late as August 18, 1934 in a report contained in Senate Committee Print, 74th Congress [R. 344] it is stated that

> "The act of July 18, 1918, in making appropriations for this channel . . . provides that local interests shall deed to the United States free of cost an additional strip of land 200 feet wide alongside the present 400-foot wide right-of-way."

The trial judge in his oral decision brushed aside all the above evidence by saying [R. 503, 504] that these contemporaneous and subsequent interpretations were not by the government "but by subordinates whom I thought used such references more for private purposes." The above record contradicts this statement squarely and shows that the government itself acting not only through its Chief of Engineers and its Secretary of War, but in its sovereign capacity through acts of Congress, over a period of twenty-five years construed the government's title to this channel as an easement and so represented to respondent. It should not now be heard in equity to claim any greater estate.*

It is respectfully submitted that the evidence above outlined demonstrates that whatever may have been the technical estate conveyed by the deeds, neither party ever intended that the United States should have the right to use said lands for any other purpose than a free, public, navigable channel and that all other uses are therefore forbidden. It follows that if the Circuit Court had resorted to the extraneous evidence its decision as to the intent of the parties would have been the same as that which it found to have been expressed by the language used in the deeds.

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*See *Parish of Jefferson v. Texas Co.*, 189 So. 580, 590, Cer. Den. 308 U.S. 601.

APPENDIX "B."

Excerpt from Statutes of California, 1911, Page 1304.

"Section 1. There is hereby granted to the City of Long Beach, a municipal corporation of the State of California, and to its successors, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all the tide lands and submerged lands, whether filled or unfilled, within the present boundaries of said city, and situated below the line of mean high tide of the Pacific ocean, or of any harbor, estuary, bay or inlet within said boundaries, to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions following, to-wit:

"(a) That said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said city, or its successors, shall not at anytime, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsoever; provided, that said city, or its successors, may grant franchises thereon, for limited periods, for wharves and other public uses and purposes, and may lease said lands, or any part thereof, for limited periods, for purposes consistent with the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor; . . ."